

2010 WL 2806239 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

Lanna ROBY, Plaintiff,
v.
Paul David MARGOLIS, M.D., Defendant.

No. 10-103804A.
June 23, 2010.

Appeal from the District Court of Sedgwick County, The
Honorable Mark A. Vining, District Court No. 07-CV-2854

Brief of Appellant

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Oral Arguments Requested

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SECONDARY SOURCES	
AMA, Physician Characteristics And Distribution In The United States (2007), Table 5.17, at pp. 327-28	43
Arnold, <i>Trial by Jury: The Constitutional Right</i> , 22 HOFSTRA L. Rev. 1, 14 (1993)	20
Baicker & Chandra, <i>The Effect of Malpractice Liability on the Delivery of Health Care</i> , Nat'l Bur. Of Econ. Research, Working Paper Series, No. 10709 (Aug. 2004)	44
Blackstone, W. Commentaries on the Laws of England (1766; 1992 reprint)	17, 19, 24
Brogan, H. History of the United States 116 (1990 ed.)	19
Coke, E. The First Part of the Inst, of the Laws of England § 257a (1628; 19th ed., 1832)	17
Declaration of Independence ¶ 20 (U.S. 1776)	20
<i>First Inaugural Address</i> (1801), in 5 Jefferson, Writings of Thomas Jefferson 143 (1896)	21
<i>The Federalist No. 83</i> (Alexander Hamilton), in The Federalist Papers 464 (Isaac Kramnick ed., 1987)	21
Galanter, Marc, <i>Real World Torts: An Antidote to Anecdote</i> , 55 MD. L. REV. 1093, 1120-1123 (1996)	44
Holdsworth, William, A History of English Law 312 (7th ed. 1956)	16
Hyman & Silver, <i>Believing Six Improbable Things: Medical Malpractice and "Legal Fear,"</i> 28 Harv. J.L. & Pub. Pol'y 107, 114-15 (2004)	44
*viii Index Digest of State Constitutions 800-01 (N.Y. Constitutional Convention Comm'n 1915)	22
Landsman, Steven, <i>The Civil Jury in America</i> , 44 Hastings L.J. 579, 588 (1993)	18, 19
The Legal Code of Alfred the Great 41 (M.H.Turk, ed. 1893)	16
Lesser, Maximus A., The Historical Development of the Jury System 6-9 (1992)	16
Levy, Leonard, Legacy of Suppression 281 (1960)	20
Lutz, D., Toward a Usable Past 35 (Finkelman, ed. 1991)	20

Magna Carta of King John, Chap. 39 (1215)	16
McCormick, Handbook on the Law of Damages 22 (1935) ..	16, 17, 24
Morgan, E., <i>et al.</i> , The Stamp Act Crisis 137, 145-46, 175-86 (3d ed. 1992)	19
Plucknett, Concise History of the Common Law 108 (5th ed. 1956)	16
Scott, Austin, <i>Trial by Jury and the Reform of Civil Procedure</i> , 31 Harv.L.Rev. 669, 675 (1918)	17
Sir Frederick Pollock & F. W. Maitland, The History of English Law Before the Time of Edward I 140-42 (2d ed. 1968)	16
Sources of Our Liberties 5 (R. L. Perry & J. C. Cooper eds., 1978)	16
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U.S. Dept. of Labor, Bureau of Labor Statistics, "Consumer Price Index Inflation Calculator." http://www.bls.gov/cpi/ ...	29
U.S. GAO, Medical Malpractice: Implications of Rising Premiums on Access to Health Care, at 5, 10, 13, GAO-03-836 (Aug. 29, 2003), http:// www.gao.gov/ new.items/d03836.pdf)	43-44
Witt, John F., <i>Toward a New History of American Accident Law</i> , 114 Harv.L.Rev. 690, 701 (2001)	15-16
Wolfram, C, <i>Constitutional History of the Seventh Amendment</i> , 57 Minn.L.Rev. 639, 654-55 (1973)	18, 19, 21

*1 NATURE OF THE CASE

This is a medical malpractice case brought by Lanna Roby. On August 17, 2005 Ms. Roby underwent an [electrophysiology study](#) and ablation procedure performed by David Margolis, M.D. As a result of the ablation procedure Ms. Roby suffered [complete heart block](#) requiring implantation of a permanent pacemaker. Ms. Roby subsequently developed [congestive heart failure](#) due to the pacemaker.

On August 19, 2009, the jury returned a verdict assigning 100% of the fault to Dr. Margolis and awarding Ms. Roby damages totaling \$4,134,288.26. This damage award included noneconomic damages totaling \$2,000,000 and loss of services damages totaling \$310,000. This award was reduced by the district court by application of [K.S.A. §60-19a02](#). This appeal primarily involves the constitutionality of [K.S.A. 60-19a02](#).

ISSUES TO BE DECIDED ON APPEAL

- a) Is [K.S.A. §60-19a02](#) Unconstitutional Since It Violates Four Provisions Of The [Kansas Constitution: Sections 1 \(Equal Rights\), 5 \(Trial By Jury\), And 18 \(Remedy By Due Course Of Law\)](#) Of The Bill Of Rights, As Well As The Unenumerated But Well-Recognized Guarantee Of The Separation Of Powers?
- b) Is Defendant Margolis Precluded From Raising The Noneconomic Damage Cap Of [K.S.A. §60-19a02](#) Due To His Failure To Affirmatively Plead The Same In His Answer And/Or His Failure To Raise The Issue In The Pretrial Order?

STATEMENT OF FACTS

A. Dr. Margolis' Treatment Of Lanna Roby And Her Resulting Injuries.

On August 17, 2005 Lanna Roby underwent an [electrophysiology study](#) and ablation procedure that was performed by P. David Margolis, M.D. [ROA v. 10, p. 993, 11. 20-25]. As a result of the ablation procedure, Ms. Roby suffered [complete heart block](#)--

a significant complication meaning that her heart will not beat on its own. [ROA v. 7, p. 283, 11.16-23; v. 10, p. 1049, 11. 21-25]. Ms. Roby will be pacemaker dependent *2 for the rest of her life. [ROA v. 7, p. 283, 11. 16-25; v. 10, p. 1049, 11. 18-20]. Ms. Roby later developed [congestive heart failure](#) due to the implantation of the permanent pacemaker. [ROA v. 8, p. 435, 1. 23--p. 436, 1.1].

B. Electrophysiology Studies And Ablation Procedures.

The process of performing an [electrophysiology study](#) involves placement of catheters into vessels in the groin and passing the catheters to the heart under fluoroscopic guidance. [ROA v. 7, p. 222, ll. 2-19]. Two to five catheters are placed in the heart. *Id.* The catheters have electrodes on the ends that allow the physician to record the pace of heart electricity on machine tracings. [ROA v. 7, p. 221 ll. 17-25].

The initial phase [Stage 1] of the [electrophysiology study](#) is to record the electrical activity of the heart to allow the doctor to make a diagnosis. [ROA v. 7, p. 222, 11. 5-19; p. 223, ll. 9-19]. The electrophysiologist paces the heart to produce the rhythm disturbance and localize the mechanism of [tachycardia](#). [ROA v. 7, p. 223, ll. 2-9]. The catheters placed in the heart have electrodes on the tips and energy is placed through them to control or pace the heart. [ROA v. 7, p. 236, ll. 1-8]. This is called "pacing." [ROA v. 7, p. 235, 1. 17--p. 236, 1. 8]. Pacing is performed through a variety of maneuvers to make a diagnosis. [ROA v. 7, p. 236, ll.1-8].

Stage 2 of the study is the ablation procedure. [ROA v. 7, p. 223, ll. 9-19]. In this stage one of the catheters is removed and replaced with a specialized catheter that has an energy tip. *Id.* Radiofrequency energy is placed through the catheter tip into the heart to burn a small area of tissue in the heart. *Id.* The ablation is intended to cure the condition diagnosed in stage I. *Id.*

***3 C. Dr. Margolis' Breach Of The Standard Of Care In Performing The [Electrophysiology Study](#) And Ablation.**

Ms. Roby had a form of [supraventricular tachycardia](#) or rapid heart beat. [ROA v. 7, p. 223, ll. 22-25, p. 236, ll. 12-15]. The differential diagnosis of her condition was [atrial tachycardia](#), AV node reentry [tachycardia](#) ("AVNRT") or [AV reentrant tachycardia](#) ("AVRT"). [ROA v. 7, p. 224, 1. 18--p. 225, 1. 4; v. 9, p. 829, ll. 19-25]. An AVRT is also known as an [accessory pathway](#) or bypass tract. [ROA v. 7, p. 215, ll. 3-16].

There are at least 5 protocols available to rule out AVRT including parahisian, entrainment, timed PVCs, atrial pacing and ventricular pacing. [ROA v. 7, p. 237, 1. 3-- p. 238, 1. 9]. Dr. Margolis performed none of these maneuvers in a standardized protocol fashion to rule out an AVRT due to an [accessory pathway](#). [ROA v. 7, p. 238, ll. 1-9; v. 9, p. 832, 1. 4--p. 834, 1.12; v. 10, p. 1052, 1. 19--p. 1055, 1. 10].

Plaintiffs expert, Eric Prystowsky, M.D., opined that the standard of care requires a physician to perform pacing maneuvers in the lab (as described above) in a systematic and protocol fashion to rule out an AVRT due to an [accessory pathway](#). [ROA v. 7, p. 261, 1. 16--p. 265, 1. 15]. Dr. Prystowsky further testified that Dr. Margolis breached the standard of care in his treatment of Ms. Roby by failing to make a diagnosis through these pacing maneuvers or methods. [ROA v. 7, p. 242, 1. 19--p. 243, 1. 15]. Dr. Prystowsky concluded that there was no systematic attempt made by Dr. Margolis to make a correct diagnosis between AVRT and AVNRT prior to ablation so a diagnosis was not made by Dr. Margolis. [ROA v. 7, p. 269, 1. 18--p. 270, 1. 16].

Dr. Prystowsky further opined that the correct diagnosis of Ms. Roby's condition was AVRT due to an [accessory pathway](#). [ROA v. 7, p. 243, ll. 16-20]. This was based upon four (4) findings from the [electrophysiology study](#). [ROA v. 7, p. 243, 1. 21--p. *4 252, 1. 21]. Defense expert Kevin Whelan, M.D. agreed that the correct diagnosis was AVRT due to an [accessory pathway](#). [ROA v. 9, p. 834, 1. 15--p. 835, 1. 13]. Dr. Margolis, however, diagnosed Ms. Roby to have an AVNRT. [ROA v. 9, p. 841, ll. 13-15. v. 10, p. 1056, ll. 4-9]. Dr. Margolis therefore misdiagnosed Ms. Roby's [tachycardia](#).

It is important to make a correct diagnosis because the ablation treatment approaches to AVRT due to an [accessory pathway](#) and an AVNRT are totally different. [ROA v. 7, p. 274, ll. 19-24]. With an AVRT the electrophysiologist spends a lot of time identifying the “x” that marks the spot so that radiofrequency energy is placed within 3 or 4 millimeters of the pathway. [ROA v. 7, p. 275, l. 10--p. 276, l. 13].

On the other hand, with AVNRT as Dr. Margolis misdiagnosed, you do not identify an “x” that marks the spot but ablate over a wider area based on anatomical markers. *Id* Dr. Margolis made 13 ablation burns based upon his misdiagnosis of AVNRT. [ROA v. 9, p. 843, l. 3--p. 844, l. 6].

As a result of Dr. Margolis ablation procedure Ms. Roby suffered [complete heart block](#). [ROA v. 7, p. 282, ll. 14-15; v. 10, p. 1049, ll. 12-14]. Dr. Prystowsky further opined Dr. Margolis breached the standard of care because actual ablation was done in an incorrect manner, resulting [complete heart block](#). [ROA v. 7, p. 243, ll. 8-15]. Dr. Prystowsky also opined that Ms. Roby would not have suffered [complete heart block](#) if Dr. Margolis had properly diagnosed her condition and performed an ablation for an AVRT due to an [accessory pathway](#). [ROA v. 7, p. 282, l. 19--p. 283, l. 8].

D. Lanna Roby's Development Of [Congestive Heart Failure](#) As A Result Of The Permanent Pacemaker.

After Ms. Roby suffered the [complete heart block](#), Jesus Val-Mejias, M.D. an electrophysiologist at Galichia Medical Group in Wichita, KS took over her care. [ROA v. 8, p. 400, ll. 3-9, p. 405, ll. 20-25]. Ms. Roby became a patient of Dr. Val-Mejias on August 19, 2005 and has continued to be his patient to the present day. [ROA v. 8, p. 405, ll. 20-25, p. 416, ll. 4-6].

In February 2006 Dr. Val-Mejias diagnosed Ms. Roby to have [congestive heart failure](#). [ROA v. 8, p. 423, l. 5--p. 424, l. 20]. Dr. Val-Mejias opined that the [congestive heart failure](#) developed due to the pacemaker implanted by Dr. Margolis on August 17, 2005. [ROA v. 8, p. 434, l. 2- p. 435, l. 9; p. 455, l.22--p. 456, l. 12].

On February 3, 2006, in an attempt to treat her [congestive heart failure](#), Dr. Val-Mejias replaced the ventricular pacing wire from the right ventricular apex to the outflow tract [ROA v. 8, p. 423, l. 5 --p. 424, l. 14]. Ms. Roby improved for a period of time after the pacing wire was moved. [ROA v. 8, p. 436, l. 2 --p. 437, l. 25]. However, Ms. Roby's [congestive heart failure](#) continued to progress--Dr. Val-Mejias testified “we kept dealing with more and more [heart failure](#), more and more drugs, increasing dosages of drugs. She ended up taking ridiculous amounts of diuretics and then she started the low potassium as a result of that.” [ROA v. 8, p. 438, ll. 1-6].

In July 2008 Dr. Val-Mejias recommended proceeding with implantation of a biventricular pacemaker. [ROA v. 8, p. 443, l. 16--p. 444, l. 24; p. 450, l.22--p. 451, l. 2]. A [biventricular pacemaker](#) allows the physician to resynchronize the contraction so there is a more concentric squeeze of the heart. [ROA v. 8, p. 444, l. 7--p. 445, l. 6]. The [biventricular pacemaker](#) was implanted on July 22, 2008. [ROA v. 8, p. 451, ll. 8-16].

Since implantation of the biventricular pacemaker Ms. Roby is “definitely better.” [ROA v. 8, p. 452, ll. 11-14]. Ms. Roby has more exercise capacity and her fluid capacity is better. [ROA v. 8, p. 452, ll. 15-21]. However, due to her pacemaker and [congestive](#) *6 [heart failure](#), Ms. Roby will continue to require follow-up care with a cardiologist, repeat [echocardiograms](#), medications for [fluid retention](#) and low potassium. [ROA v. 8, p. 453, l.11-- p. 455, l. 8; p. 455, l. 22--p. 458, l. 11]. Patients with [congestive heart failure](#) also require hospital follow-up for complications. [ROA v. 8, p. 458, ll. 12-15].

E. Lanna Roby Has And Will Suffer Significant Noneconomic Losses Due To The Pacemaker And Her Development Of [Congestive Heart Failure](#).

At the time of trial in August 2009, Lanna Roby was 35 years old. [ROA v. 9, p. 625, ll. 19-21]. She is married to Bryan Roby and they have two children Braiden (age 9) and Brianna (age 8). [ROA v. 8, p. 357, ll. 8-10]. Braiden is very active and is involved in numerous sports including football, basketball, baseball and soccer. [ROA v. 9, p. 626, l. 22--p. 627, l. 9]. Brianna

is also very active and is involved in dance, gymnastics and soccer. [ROA v. 9, p. 627, ll. 10-12]. They also participate in many tournaments. [ROA v. 9, p. 627, ll. 7-9].

Ms. Roby has essentially been a mother and homemaker since Brianna was born. [ROA v. 9, p. 629, ll. 8-10]. Prior to the subject medical procedure, Ms. Roby would take her children swimming and fishing. [ROA v. 9, p. 630, ll. 1-11]. Ms. Roby was very active and went to Braiden's school field trips, took the kids swimming, took them on day trips and to the park to play. [ROA v. 8, p. 366, ll. 3-8].

In the January 2006 time frame, Ms. Roby testified she was exhausted and she slept a lot. [ROA v. 9, p. 645, ll. 19-25]. She was forced to sleep in a recliner due to her inability to sleep in her own bed. *Id.* She just kept retaining fluid and felt like she was drowning. *Id.* Her heart was pounding and she “wasn't active in anything at that time at all.” [ROA v. 9, p. 645, l. 25--p. 646, l. 2], This was something she felt “on an everyday *7 basis, 24/7.” [ROA v. 9, p. 646, ll. 7-9]. She merely sat in a room, in a recliner, with oxygen. [ROA v. 9, p. 647, ll. 5-16].

When Dr. Val-Mejias moved the ventricular lead in February 2006, Ms. Roby noticed some physical improvement. [ROA v. 9, p. 647, ll. 1-4]. She was able to do more like play games with the kids and be at the table while they were eating. [ROA v. 9, p. 647, ll. 5-16]. She could also sit in a chair and watch the children play outside. *Id.* She was not 100% but her exhaustion was not as bad and she was able to be a little more on the active side. [ROA v. 9, p. 647, ll. 5-16].

Unfortunately, after 5 or 6 months she began to feel weaker again. [ROA v. 9, p. 649, ll. 5-16]. (p. 649). Ms. Roby testified “I was weak. I was tired. I was exhausted, and the fluid started coming back on and everything just started compounding on me.” [ROA v. 9, p. 647, ll. 6-20]. Ms. Roby continued to treat with Dr. Val-Mejias. [ROA v. 9, p. 649, l. 23--p. 651, l. 10].

In the late summer of 2007, Ms. Roby started going downhill very fast. [ROA v. 9, p. 651, l. 23--p. 652, l. 6]. Ms. Roby felt like her body was failing her and she had problems with exhaustion, shortness of breath, weight gain and pain. [ROA v. 9, p. 652, ll. 2-6]. Ms. Roby had a discussion with her primary care physician, Tana Goering, M.D., about her congestive [heart failure](#) and end of life issues. [ROA v. 9, p. 652, ll. 10-18]. Dr. Goering told Ms. Roby that she should think about mortality issues and that hospice was something that she could consider. *Id.* Ms. Roby's parents had moved in at that time to help care for Braiden and Brianna. *Id.*

Ms. Roby had discussions with her family about end of life issues and hospice. [ROA v. 9, p. 652, l. 19, p. 653, l. 1]. It was really hard on Ms. Roby because “she didn't *8 want to go on Hospice” and “did not want to leave my family.” [ROA v. 9, p. 653, ll. 2-8]. Things got bad enough, however, that Ms. Roby asked her family to help her get through the holidays and she would have hospice come in after Christmas. *Id.* Hospice took over Ms. Roby's care in January 2008. When hospice came in, Ms. Roby begged them to not take away her heart medicine because she was still young and “still had that want and hope and faith.” [ROA v. 9, p. 653, l. 15--p. 654, l. 8].

Hospice provided care to Ms. Roby until shortly before she was admitted to Wesley Medical Center on March 31, 2008. [ROA v. 9, p. 654, ll. 18-22]. When she was admitted to Wesley Ms. Roby was very, very ill and wasn't able to eat, drink or swallow anything. [ROA v. 9, p. 657, ll. 9-12]. It was determined that Ms. Roby was critically low on potassium and had detach rhythms. [ROA v. 9, p. 657, ll. 13-17]. Ms. Roby awoke on April 5, 2008. [ROA v. 9, p. 658, ll. 10-11]. She was taken to a regular room and was discharged from the hospital on April 6, 2009. [ROA v. 9, p. 658, ll. 13-24].

After being discharged from Wesley, Ms. Roby began seeing her regular doctors again including Dr. Val-Mejias and Dr. Goering who restarted her medical regimen for [congestive heart failure](#). [ROA v. 9, p. 659, ll. 3-11]. Ms. Roby continued to have problems with her potassium levels and required hospitalizations. [ROA v. 9, p. 660, l. 16--p. 661, l. 17]. On July 1, 2008 Ms. Roby was hospitalized and [echocardiograms](#) demonstrated decreased heart function. [ROA v. 9, p. 662, l. 18--p. 665, l. 24].

On July 18, 2008 Dr. Val-Mejias removed the pacemaker implanted by Dr. Margolis and implanted a [biventricular pacemaker](#). [ROA v. 8, p. 443, 1. 16-- p. 444, 1. 24; p. 450, 1. 22--p. 451, 1. 2]. The biventricular pacemaker has helped Ms. Roby and she has progressively gotten better. [ROA v. 9, p. 668, ll. 10-19]. Ms. Roby testified:

*9 I have better--obviously I'm not retaining fluid. I'm not carrying that around with me. My diuretics have been lessened. My potassium is still--I have to take a large amount. I feel better. I'm still exhausted. It's not just as easy, well, the pumping power looks better now. I require a lot of medication to live for the heart and there is dizziness. There's drowsiness. There's all kinds of things that go along with that.

[ROA v. 9, p. 668, 1. 22--p. 669, 1. 5]. Ms. Roby still suffers, however, from side effects' of her numerous medications. [ROA v. 9, p. 669, ll. 6-8]. In describing how she is better today after the [biventricular pacemaker](#), Ms. Roby further testified:

I can do more things. I can function more. I have to still pick and choose sometimes, if there's a whole bunch of activities, but I can still be more active. I can still do things with my children and I'm just doing better now.

[ROA v. 9, p. 669, ll. 16-20]. Although she feels better, Ms. Roby still has to rest during the day because she continues to be "flat exhausted" at times. [ROA v. 9, p. 671, ll. 18-23]. Ms. Roby therefore relies upon family members or friends to help her out with the kids. [ROA v. 9, p. 671, 1. 10-p. 672, 1. 16]. Ms. Roby will also become extremely fatigued with activity misses certain time and activities with her children to compensate for these limitations. [ROA v. 9, p. 674, 1. 14--p. 675, 1. 5].

Since her development of [congestive heart failure](#), Ms. Roby hasn't been able to be a room mother at school for either of her children or to go on field trips with them. [ROA v. 8, p. 367, ll. 21-25]. She also has been unable to take them fishing or out to the park or be outside with them for long periods of time. [ROA v. 8, p. 367, 1. 24--p. 368, 1. 7]. Ms. Roby "can't do a lot of things" and doesn't make it to a lot of the kids activities especially with ball tournaments and school activities. [ROA v. 8, p. 368, ll. 8-22].

Ms. Roby's relationship with her husband has also changed in that they "don't have the physical or emotional relationship that they used to have." [ROA v. 8, p. 369, II. *10 5-7]. It has also greatly affected their sexual relationship. [ROA v. 8, p. 368, 11.3-7]. Ms. Roby is not as much of a companion as they are not able to go out and do the things that they did together in the past. [ROA v. 8, p. 368, 11.3-6].

F. Procedural Facts

On August 19, 2009, following trial, the jury entered a verdict that assigned 100% of the fault to Dr. Margolis and itemized damages as follows:

A. Noneconomic Loss to Date:	\$500,000.00
B. Future Noneconomic Loss:	\$1,500,000.00
C. Medical Expenses to Date:	\$308,652.06
D. Future Medical Expenses:	\$1,515,636.20
E. Loss or Impairment of Services:	\$310,000.00
TOTAL DAMAGES	\$4,134,288.26

[ROA. v. 4, pp. 91-92].

On September 8, 2009 Dr. Margolis filed an objection seeking to reduce the jury's award to \$250,000 pursuant to [K.S.A. §60-19a02](#). [ROA v. 4, pp. 96-97]. He had not raised the noneconomic damage cap of [K.S.A. §60-19a02](#) as a defense in his answer or in the pretrial conference order. [ROA v. 1, pp. 28-29, pp. 81-93]. On September 23, 2009 Ms. Roby filed a response on the basis that his failure to raise [K.S.A. §60-19a02](#) in his answer and the pretrial order precluded him from doing so after the jury verdict. [ROA v. 5, pp. 1-6]. On September 25, 2009, Ms. Roby filed a supplemental response on the grounds that [K.S.A. §60-19a02](#) is unconstitutional. [ROA v. 5, pp. 13-49].

On October 2, 2009, the District Court sustained Dr. Margolis' objection by entering a *Journal Entry of Judgment* that reduced the jury's noneconomic damage award from \$2,000,000 [\$500,000 for past noneconomic loss and \$1,500,000 for future noneconomic loss] to \$250,000 pursuant to [K.S.A. §60-19a02](#). [ROA v. 5, pp. 50-53]. The court reduced the jury's award of \$4,134,288.26 to a judgment of \$2,384,288.26. *Id.*

***11** On October 19, 2009 Dr. Margolis filed a *Motion to Alter or Amend the Judgment Pursuant to K.S.A. §§ 60-259(f) & 60-19a02(d)* which sought to reduce the jury's award for loss or impairment of services from \$310,000.00 to \$30,560.00. [ROA v. 5, pp. 56-62]. Dr. Margolis argued that the reduction was proper as only \$30,560 was economic in nature and the remainder of the award subject to the \$250,000 cap on noneconomic damages under [K.S.A. §60-19a02](#). *Id.* On November 11, 2009, Ms. Roby responded to Dr. Margolis' motion. [ROA v. 5, pp. 89-103].

On December 4, 2009, the District Court entered an order reducing the jury's loss or impairment of services award from \$310,000 to \$50,000. [ROA v. 5, pp. 116-117]. The Court found that the evidence supported that \$50,000 of the jury's \$310,000 award for loss of services was for economic loss. *Id.*

SUMMARY OF THE ARGUMENT

Appellant respectfully submits that [K.S.A. §60-19a02](#) violates four provisions of the [Kansas Constitution: Sections 1](#) (equal rights), 5 (trial by jury), and 18 (remedy by due course of law) of the Bill of Rights, as well as the unenumerated but well-recognized guarantee of the separation of powers.

The Kansas Supreme Court is currently considering the constitutionality of [K.S.A. §60-19a02](#) in *Miller v. Johnson*, docket number 99818. Appellant submits that the Court's decision in the *Miller* case will be dispositive of the primary issue presented in this appeal. Appellant therefore requests that this Court delay a decision in this case until the ruling in *Miller*. Such a delay promotes the efficient administration of justice in this matter as it would likely avoid either Supreme Court review or rehearing.

***12 ARGUMENT AND AUTHORITIES**

I. Standard of Review

The constitutionality of a statute is a question of law, to which this Court applies a *de novo* review. *State ex rel. Six v. Kansas Lottery*, 186 P.3d 183, 188 (Kan. 2008). See *Peden v. Kansas Dept. of Revenue*, 261 Kan. 239, 250, 930 P.2d 1 (1996) (“unlimited *de novo* standard of review”). The constitutionality of a statute is presumed and all doubts as to its validity are resolved in favor of constitutionality. Before determining that a statute is unconstitutional, the statute must clearly appear to violate the Constitution. *Jackson ex rel. Essien v. Unified Sch. Dist. No. 259*, 29 Kan. App. 2d 826, 828, 31 P.3d 989, 992 (Kan. Ct. App. 2001), citing *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 300, 955 P.2d 1136 (1998).

II. [K.S.A. §60-19a02](#) Is Unconstitutional As It Violates Four Provisions Of The [Kansas Constitution: Sections 1](#) (Equal Rights), 5 Trial By Jury), And 18 (Remedy By Due Course Of Law) Of The Bill Of Rights. As Well As The Well-Recognized Guarantee Of The Separation Of Powers.

K.S.A. 60-19a02's cap is unconstitutional as it clearly violates four provisions of the [Kansas Constitution: Sections 1](#) (Equal Rights), 5 (Trial by Jury), and 18 (Remedy by Due Course of Law) of the Bill of Rights, as well as the unenumerated but well-recognized guarantee of the Separation of Powers.

Appellant recognizes that in *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 789 P.2d 541 (1990), the Supreme Court considered and rejected a constitutional challenge to K.S.A. §60-19a02. Significantly, however, *Samsel's* decision was a very limited one, expressly holding only that K.S.A. §60-19a02 “do[es] not violate § 5 (right to a jury) or § 18 (right to due course of law for injuries suffered) of the Kansas Bill of *13 Rights.” *Id.*, 246 Kan. at 363, 789 P.2d at 558. Moreover, the constitutionality of K.S.A. 60-19a02 is currently being reconsidered by the Supreme Court in *Miller v. Johnson*.

The *Samsel* Court never was asked to consider, and certainly never ruled on, the question of whether K.S.A §60-19a02 violated any other provision of the Kansas Constitution, such as the equal protection and separation of powers guarantees. No other appellate court in Kansas has ruled on these questions either.

For the reasons set forth below, appellant submits *Samsel* was wrongly decided, as its rulings on the rights to trial by jury and due course of law are inconsistent with the text and history of the Kansas Constitution, with the Court's own well-considered precedents, and with the well-considered decisions of other state supreme courts.

Appellant also contends that it is now appropriate, twenty years after K.S.A. §60-19a02 was enacted and *Samsel* was decided, for this Court to resolve an issue left open by *Samsel*, i.e. whether a substitute remedy can become inadequate due to changed circumstances. Thus, assuming *arguendo*, that in 1988, the \$250,000 cap provided a fully adequate *quid pro quo* for the right to have a jury determine an award unlimited damages for a common law cause of action, is that *quid pro quo* still adequate today, given that \$250,000 in 1988 dollars is the equivalent of only \$142,222.37 in 2007 dollars?

A. K.S.A. §60-19a02 Violates the “Inviolable” Right to Trial by Jury

1. The United States Constitution Requires That a Jury Determine the Actual Amount of Damages

The Kansas Supreme Court has always used a historical test to define the scope of the right to jury trial, holding “inviolable” “means that the right... shall be and remain as ample and complete as it was at the time when the constitution was adopted.” *State v. City of Topeka*, 36 Kan. 76, 12 P. 310, 316 (1886).

*14 In *Samsel*, the Court relying on an historical analysis of the Seventh Amendment set out in *Tull v. United States*, 481 U.S. 412 (1987) and its progeny, held that the cap does not violate the Kansas Constitution's right to trial by jury. Eight years after *Samsel* was decided, the U.S. Supreme Court reexamined the Seventh Amendment's history and unanimously held that the holding for which *Samsel* cited *Tull*--that there is no constitutional right to have a jury decide damages--is incorrect and the Seventh Amendment protects a plaintiffs right to have a jury decide damages in cases cognizable at common law. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998).

In cases under the Seventh Amendment, the “jury *must* determine the actual amount of. . . damages.” *Feltner*, 523 U.S. at 355 (emphasis added). At the district court, Dr. Margolis argued, as did the defendant in *Feltner*, that the jury's job is done when it reaches a verdict. 523 U.S. at 354. The Defendant in *Feltner* argued that the Seventh Amendment's jury trial guarantee “does not provide a right to a jury determination of the amount of the award.” *Id.* In *Feltner*, the U.S. Supreme Court explained, however, that that argument is not valid with regard to common law causes of action, like the one at issue here, but only to statutory causes of action unknown to the common law, such as the one at issue in *Tull*. *Id.*

Feltner explained the history of common law actions before the Seventh Amendment was adopted. Given that history, the Court concluded that “in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the

province of the jury” that any legislative or non-judicial approach to finalizing a damages award would fail “ ‘to preserve the substance of the common-law right of trial by jury,’ ” as the Seventh Amendment requires. *Id.* at 353, 355 (citations omitted).

*15 Legislative revision of the jury's assessment of damages, such as through the cap at issue here, fails to preserve the substance of the common law right. The cap supplants the jury's preeminent role in assessing damages according to the evidence adduced at trial. It replaces the jury's determination, made on a case-by-case basis, with a number, arbitrarily picked by legislators who never met the parties or reviewed the evidence, that must be applied on a one-size-fits-all basis.

This result cannot be reconciled with the jury trial right even if the cap is viewed as merely redefining the legal import of a jury award. Redefining a jury's determination in an analogous way, by recalculating damages after the jury's assessment, constitutes an impermissible legislative remittitur. *Hetzel v. Prince William County, Va.*, 523 U.S. 208, 211 (1998). *Hetzel* held that requiring a federal “[c]ourt to enter judgment for a lesser amount than that determined by the jury without allowing [the plaintiff] the option of a new trial, cannot be squared with the Seventh Amendment.” *Id.* (citation omitted).

As demonstrated below, viewing the right to trial by jury and the law of damages through history's lens confirms that *Feltner* was right, that *Tull* and its progeny are inapposite to this case, and that the cap violates Kansas' inviolable right to a jury trial.

2. The Framers of the Constitution Repudiated Legislatively Determined Damages

a. Monarchs Determined Damages in Ancient Times

Determination of damages for personal injuries by fiat is an old idea that Anglo-American jurisprudence consciously rejected in favor of the more democratic method of case-by case adjudication by citizen-jurors. Hammurabi's Code (circa 2000 B.C.) “included a schedule of damages that an injurer had to pay to the injured, as did the early Roman Twelve Tables,” circa 450 B.C. Witt, *Toward a New History of American* *16 *Accident Law*, 114 *Harv.L.Rev.* 690, 701 (2001)(footnote omitted). Similarly, in the ninth century, 200 hundred years before the Norman Conquest, King Alfred the Great established an elaborate schedule of damages (known as bots) for injuries to “the parts of the body from head to foot.” The Legal Code of Alfred the Great 41 (M.H. Turk, ed. 1893). See McCormick, *Handbook on the Law of Damages* 22 (1935).

b. Juries Have Long Decided Tort Damages

The jury system, which became the American democratic device for determining damages, itself has a long pedigree, originating in Ancient Greece. Maximus A. Lesser, *The Historical Development of the Jury System* 6-9 (1992). It flowered in medieval Europe. Holdsworth, *A History of English Law* 312 (7th ed. 1956). Precursors to the modern jury existed in England in the 10th century, Plucknett, *Concise History of the Common Law* 108 (5th ed. 1956), and the first reports of jury trials in English courts date to the late 11th century. 1 Sir Frederick Pollock, *The History of English Law Before the Time of Edward 1140-42* (2d ed. 1968).

By 1215, juries were so highly prized as a way of checking government **abuses** that when King John's aggrieved barons forced his attendance at Runnymede they compelled him to guarantee “no Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties ... but by lawful judgment of his Peers” Magna Carta of King John, Chap. 39 (1215). Since then, no legal phrase “has been cited more often as a guarantee of the liberties of the citizen.” *Sources of Our Liberties* 5 (Perry ed. 1978).

By the time the Mayflower reached American shores, England had abandoned the *bots* and other pre-set schedules for awarding tort damages, and the jury's authority to determine and award tort damages as part of its fact-finding duties was undisputed. The

*17 jury's authority to definitively set--and not merely suggest--damages was settled at least by the time of Sir Edward Coke, who was the greatest legal scholar in late 16th and early 17th Century England. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 *Harv.L.Rev.* 669, 675 (1918). Notably, Coke defined common law tort damages as “the recompence that is given by the jury to the plaintife... for the wrong the defendant hath done unto him.” 2 Coke, *The First Part of the Inst. of the Laws*

of England § 257a (1628; 19th ed. 1832). “[F]rom the beginning of trial by jury” in Anglo-American jurisprudence, damages and juries were regarded as inseparable, with “[t]he amount of damages... a ‘fact’ to be found by the jurors.” McCormick, *Handbook on the Law of Damages* at 24.

On the eve of the American Revolution, Sir William Blackstone echoed Coke and defined tort damages as what is “given to a man by a jury, as a compensation and satisfaction for some injury sustained.” 2 Blackstone, *Commentaries on the Laws of England* at 438 (1766; 1992 reprint). He stressed that it is solely the jury’s province to “assess the damages ... sustained by the plaintiff in consequence of the injury” 3 Blackstone, *Commentaries on The Laws of England* at 376. Thus, if “damages are to be recovered, a jury must... assess mem.” *Id.* at 397. As noted in *Feltner*, it has long been recognized that:

“by the law the jury are judges of the damages.” *Lord Townshend v. Hughes*, 86 Eng. Rep. 994, 994-995 (C.P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court stated that “the common law rule as it existed at the time of the adoption of the Constitution” was that “in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.” *Id.* at 480. And there is overwhelming evidence that the consistent practice at common law was for juries to award damages.

*18 523 U.S. at 353 (internal marks and parallel citations omitted). See *Wilford v. Berkeley*, 97 Eng.Rep. 472, 472 (K.B. 1758) (“damages to be assessed... [are] strictly and properly the province of the jury”); *Fabrigas v. Mostyn*, 96 Eng.Rep. 549, 549 (K.B. 1773) (same).

Pre-ordained schedules of damages--set by a distant sovereign at a distant time and limiting tort awards in every case--were disfavored and obsolete at least by the mid-eighteenth century, having been replaced by individualized justice, with damages determined by jurors on a case-by-case basis in light of the evidence adduced at a trial.

c. The Jury Fostered Democracy in England

Serving on juries “had the unanticipated effect of training ‘English society ... in the skills and the practice of self-government.’ Over the course of 600 years, English jurymen learned to rule themselves” and “developed traditions of independence from central bureaucratic authority.” Landsman, *The Civil Jury in America*, 44 *Hastings L.J.* 579, 588 (1993) (footnotes omitted). “The jury was also responsible for introducing the ‘middling sort,’ men of neither the aristocracy nor upper gentry,” and “became even more important when the volume of [civil] litigation soared” in the 17th century. *Id.* at 589. Jurors came to “play[] a critical role in regulating society.” *Id.* By the time of the Glorious Revolution of 1688, “[w]hen the struggle for political liberty was joined ..., Englishmen who had known and enjoyed self-governance were ready to fight for what they had come to perceive as their rights.” *Id.* at 588.

By the late 17th century, “trial by jury emerged as the principle defense of English liberties.” *Id.* at 590. See Wolfram, *Constitutional History of the Seventh Amendment*, 57 *Minn.L.Rev.* 639, 654-55 (1973). This tradition continued into the 18th century, when “[t]he jury came to operate as a defender of rights in both the criminal and *19 civil settings” and came to be regarded as “the very essence of liberty, a fundamentally democratic institution that served as a check on the tyrannical and oppressive power of government.” Landsman, 44 *Hastings L. J.* at 591-92 (footnotes omitted). This explains why even Blackstone, who believed that Parliament’s powers were nearly unlimited, proclaimed the jury trial right “the glory of the English law” and “the most transcendent privilege which any subject can enjoy.” 3 Blackstone *Commentaries* at 379.

d. The Jury Inspired American Independence and Democracy

The earliest English settlers to the New World brought the common law with them, so “[t]he institution of jury trial in civil cases was a familiar and well-ensconced feature of pre-1787 political life.” Wolfram, 57 *MINN. L. Rev.* at 653. Indeed,

“[t]reatises extolling the jury flooded the market and profoundly influenced eighteenth century American... views about jury trial.” Landsman, *44 Hastings L.J.* at 590.

Colonial Americans felt entitled to the same common law rights as the King's English subjects and were aggrieved when Parliament enacted the Stamp Act in 1765, which effectively closed civil courts throughout the American colonies for an extended period and mandated that Americans charged with offenses against the Crown be tried before British judges in Admiralty courts rather than before juries in colonial courts. Brogan, *History of the United States* 116 (1990); Morgan, *The Stamp Act Crisis* 137, 145-46, 175-86 (3d ed. 1992). Both aspects of the Stamp Act denied Americans the right to be tried by a jury of their peers, as did other statutes that made it impossible for Americans to avail themselves of juries in civil or criminal cases, or, if they did, to have the benefits of the jury's decisions. Wolfram, *57 Minn.L.Rev.* at 654 & n.47.

*20 The Declaration of Independence famously cited Parliament's “depriv [ations]” of these “benefits”--not just the *form* of jury trial, but the *benefits* of the jury's deliberations--as one of the grounds justifying the colonies' decision to secede from England. Declaration of Independence ¶ 20 (U.S. 1776)(charging Parliament with “depriving us in many cases, of the benefits of Trial by Jury”). See Arnold, *Trial by Jury: The Constitutional Right*, *22 Hofstra L Rev.* 1, 14 (1993); Lutz, *Toward a Usable Past* 35 (Finkelman, ed. 1991).

As one veteran of the struggles against England succinctly explained: “ ‘What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken away.’ ” Wolfram, *57 Minn. L. Rev.* at 683 (quoting James M'Dowall).

e. Jury Trial Guarantees Were Included in Every State Constitution and Protection There Inspired the Seventh Amendment

Having watched Parliament deprive Americans of the benefits of trial by jury, citizens of the new states took pains to assure that no future legislature could do the same. Accordingly, when it came time for them to draft their first state constitutions, they elevated trial by jury from a “transcendent privilege” to an inviolable constitutional right! Indeed, jury decisions were, regarded as so crucial that “ ‘the right to jury trial was probably the only one universally secured by the first American state constitutions.’ ” *Parklane Hosiery Co. v. Shore*, *439 U.S.* 322, 341 (1979) (Rehnquist, J., dissenting) (quoting Leonard Levy, *Legacy of Suppression* 281 (1960)).

The federal constitution, as initially drafted, guaranteed the jury trial right in criminal, but not in civil, cases. Because Americans saw this right as so important, the failure to secure it nearly derailed the federal union. Arnold, *22 Hofstra L. Rev.* at 16 (footnotes omitted). As Justice Story, the greatest constitutional scholar of the early 19th *21 Century, wrote, “One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases.” *Parsons v. Bedford*, *28 U.S.* 433, 445 (1830) (Story, J.). Americans cherished the jury as more than a historical curiosity or an efficient way to assure accurate fact-finding. Wolfram, *57 Minn. L. Rev.* at 670-71. They believed the jury served as an important political institution, one that assured that liberty could flourish and that the people's rights could not be subordinated by tyrannical legislatures and “unwise legislation” or “overbearing and oppressive judges.” *Id* at 671.

The Framers added a Bill of Rights, including the Seventh Amendment, to the Constitution. Hamilton explained “[t]he strongest argument in... favor [of the civil jury] ... is a[s] security against corruption,” noting the one thing that Federalists and Anti-Federalists had in common was respect for the jury trial right: “The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.” *The Federalist No. 83* (Hamilton), in *The Federalist Papers* 464 (Kramnick ed., 1987). As Jefferson noted about the civil jury:

The wisdom of our sages and the blood of our heroes have been devoted to [its] attainment. [It] should be the creed of our political faith, the text of civil instruction, the touchstone by which we try the services of those we trust: and should we wander from [it] in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.

First Inaugural Address (1801), in 5 Jefferson, Writings of Thomas Jbpferson 143 (1896).

Justice Story was surely correct when he said: “ ‘the Constitution would have been justly obnoxious to the most conclusive objection it if had not recognized and confirmed [the right to trial by jury in civil cases] in the most solemn terms.’ ” *22 *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935)(quoting 2 STORY Const. § 1779 (1833)). This is why the U.S. Supreme Court emphasized that:

trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Id

When Kansas joined the Union, the states' adherence to this fundamental right was very strong; 32 of the 33 state constitutions then in effect (with the predictable exception of Louisiana's which was based in the law of France) guaranteed jury trials in civil actions. *See* Index Digest of State Constitutions 800-01 (N.Y. Constitutional Convention Comm'n 1915). Why these states guaranteed jury trials in civil cases is instructive. As Pennsylvania Supreme Court Justice Strong said, just one year after Kansas became the 34th State:

But if there is any right to which, more than all others, the people ... have clung with unrelaxing grasp, it is that of trial by jury.... In every constitution which has been adopted, they have taken care to secure it against infringement.... *What can this mean, but that the right of having controverted questions of fact in common law cases, decided by a jury, should be beyond the reach of any department of the government. . .?* This was the right which had always been enjoyed before, and if the constitutional provisions were not intended to protect that in all its length and breadth, they can mean nothing ... *No power in our government can take from the litigant the right to have his case tried by a jury, substantially [as it existed] when the Constitution... was adopted.*

Northern Pennsylvania Coal Co. v. Snowden, 42 Pa. 488, 492, 1862 WL 5117, at *3 (1862) (emphasis added). *See Work v. Ohio*, 2 Ohio St. 296, 302-03, 1853 WL 93, at *3-4 (1853), overruled on other grounds by *State ex rel. City of Columbus v. Boyland*, 391 N.E.2d 324 (Ohio 1979).

*23 There is no indication that the jury's common-law prerogatives had eroded by the time of Kansas statehood in 1861. Indeed, “ ‘nothing [wa]s better settled than that, in ... actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.’ ” *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (citing pre-1861 authority), *quoted with approval in, Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991); *see also St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915) (damages for pain and suffering “involves only a question of fact” for the jury), *quoted with approval in Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446-47 (2001). Finally, the supreme courts of the states whose constitutions were adopted contemporaneously with the Kansas constitution agree with *Feltner* and hold that caps on damages violate the jury trial right. *Lakin v. Senco Prod, Inc.*, 987 P.2d 463, 468-70 (Or. 1999); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 716-17 (Wash. 1989).

Given this history, it is inconceivable that the Revolution was fought, and the new Union nearly derailed, merely to allow a jury to *suggest* damages that the legislature could summarily limit.

3. The Kansas Constitution Requires That A Jury Determine The Actual Amount Of Damages.

“[T]he Bill of Rights of the Kansas Constitution preserves the right to trial by jury ... as to civil causes of action that were recognized as justiciable by the common law as it existed at the time our constitution was adopted” in 1861. *Leiker v. Gafford*, 245 Kan. 325, 361, 778 P.2d 823, 848 (1989), disapproved on other grounds by *Martindale v. Tenny*, 250 Kan. 621, 621, 829 P.2d 561, 562 (1992). Thus, Section 5 of the Kansas Bill of Rights guarantees: “The right of trial by jury shall be inviolate.”

*24 The jury trial right, properly understood, includes the substantive right to a jury's determination of damages. See McCormick, Handbook on the Law of Damages 24 (1935) (“The amount of damages ... from the beginning of trial by jury, was a ‘fact’ to be found by the jurors.”); 3 W. Blackstone, Commentaries on the Laws of England 397 (1765) (ascertainment of “the quantum of damages sustained by [the plaintiff]... is a matter that cannot be done without the intervention of a jury”); *id.* at 1339 (if a civil verdict were for the plaintiff, the jurors “assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought”). For this reason, several state supreme courts have ruled that statutory caps on damages invade the jury's function and violate the right to trial by jury. See, e.g., *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

Samsel acknowledged that “[t]he state constitution and the Kansas common law recognize that the right to a jury trial includes the right to have the jury determine damages,” 246 Kan. at 351, 789 P.2d at 551, that “when the Kansas Constitution was adopted, ‘legal precedent clearly supported compensation for pain and suffering,’ ” and that “in personal injury actions, non-economic damages, such as pain and suffering, are elements of Kansas common-law damages for the jury to consider.” *Id.*

Samsel nevertheless reasoned that although “[o]ur constitution provides that the common-law right to a jury trial includes the right to have the jury determine the amount of the damages in personal injury actions,” an “individual does not... have a vested right in the common-law rules governing negligence actions,” and “[t]he legislature can modify the right to a jury trial and the right of a jury determination of the amount of damages through its power to change the common law ____” *25 246 Kan. at 358, 789 P.2d at 555. *Samsel* also posited that “[u]nder the common law, jury verdicts have always been subject to the concurrence of the trial judge and the trial judge's power to grant a new trial,” and the “right” of courts “to grant a remittitur or a new trial does not violate the individual's right to a jury trial guaranteed by the United States Constitution.” 246 Kan. at 359, 789 P.2d at 556 (citation omitted).

This syllogism led to the Court's ultimate conclusion: K.S.A. §60-19a02 does not violate the right to trial by jury because “while taking away a plaintiff's right to receive noneconomic losses in excess of \$250,000, [the cap] also insure[s] the injured plaintiff that the court will not exercise its discretion to award less than \$250,000 when higher damages are awarded by the jury.” 246 Kan. at 362, 789 P.2d at 558. As such, K.S.A. §60-19a02 “provide[s] a *quid pro quo* to the individual whose jury awards damages for pain and suffering or noneconomic loss exceed the cap.” *Id.*

Samsel's logic was flawed and should be overturned. If an “inviolable” right can be so easily overborne by offering supposedly sufficient substitute rights or remedies, then no right is immune from legislative abridgement. As the Oregon Supreme Court noted:

[a]lthough it is true that [the Oregon cap statute] does not prohibit a jury from assessing... damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect. We conclude that to permit the legislature to override the effect of the jury's determination of . . . damages would “violate” plaintiffs' right to “Trial by Jury” guaranteed in [the Oregon Constitution]. Limiting the effect of a jury's ... damages verdict eviscerates “Trial by Jury” as it was understood in 1857 and, therefore, does not allow the common-law right of jury trial to remain “inviolable.”

Lakin, 987 P.2d at 473. See *Sofie*, 771 P.2d at 721; *Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987); and *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 738, 691 S.E.2d 218, 224 (2010).

*26 Our “inviolable” right to a trial by jury is indistinguishable from the Oregon guarantees. K.S.A. §60-19a02 implements the same type of change the Oregon Supreme Court condemned and eviscerates “trial by jury” as it was understood in 1861. The cap disdains these well-settled traditions and principles and replaces them with a hard, fast, and completely arbitrary measure of damages, a compulsory, pre-established “one-size-fits-all” formula that courts are commanded to apply in every case, without regard for the evidence and without allowing a plaintiff the option of a new trial.

As a result, K.S.A. §60-19a02 does exactly what Kansas courts had, until *Samsel*, steadfastly abjured: usurp the jury's role in calculating a malpractice victim's damages. Thus, unless and until K.S.A. §60-19a02 is struck down, Kansas courts will be required to reduce the jury's award of damages to an arbitrary, preset amount, and to do so even though the jury had been correctly instructed, even though its findings were sufficiently supported by the evidence, even though there was no hint of passion or prejudice in its verdict, and even though no legal error exists in the record. Such a regime is anathema to a plaintiff's constitutionally guaranteed right to have her damages determined by a jury.

K.S.A. §60-19a02 turns centuries of practice and accumulated judicial wisdom upside down. In this topsy-turvy world, the greater the harm suffered by the plaintiff and the greater the damages a jury awards, the less important the jury's decision on damages becomes. This result is not only perverse, it is unconstitutional. Simply put, the legislature has no legitimate authority to impair the inviolable right to trial by jury and substitute its determination of a proper compensatory award for that of a jury whose verdict reflects the evidence presented at trial. By capping non-economic damages, the *27 legislature has invaded the “inviolable” province of the jury, and K.S.A. §60-19a02 should be struck as unconstitutional.

B. K.S.A. §60-19a02 Violates the Guarantee of a Remedy “By Due Course of Law.”

Section 18 of the Kansas Bill of Rights assures that “All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.” *Samsel* upheld K.S.A. §60-19a02 against a “remedy by due course of law” challenge, asserting that because no one purportedly has a “vested interest” in the common law, 246 Kan. at 358, 789 P.2d at 555, the legislature may alter or even abolish a common law right or remedy, as long as the “[s]tatutory modification of the common law” is both “reasonably necessary in the public interest to promote the general welfare of the people of the state” and “substitute[s] [a] viable statutory remedy of *quid pro quo* (this for that) to replace the loss of the right.” *Id.*

1. K.S.A. §60-19a02 Did Not Provide a Commensurate Remedy for an Abrogated Right When That Statute Was Enacted in 1988

Even if *Samsel's* premise—that no one has a vested right in the common law—was correct (and it is not, as that notion is bottomed on a misreading of *Munn v. Illinois*, 94 U.S. 113 (1876)), K.S.A. §60-19a02 meets neither the public nor the private tests *Samsel* limned for altering a common law.

First, as detailed in Section I-E's explanation of why K.S.A. §60-19a02 also violated the Kansas Bill of Rights' guarantee of equal protection, K.S.A. §60-19a02 was not “reasonably necessary in the public interest to promote the general welfare,” because: (1) there was no medical malpractice “litigation “crisis” in the State prior to K.S.A. §60-19a02's enactment; (2) the medical malpractice “insurance crisis,” while real, was not *28 caused by the mythical medical malpractice litigation crisis but by the insurance industry itself; and (3) there was no “healthcare crisis” in Kansas, as *physicians were flocking to, not fleeing from the State* in the decade before the legislature enacted K.S.A. §60-19a02, and doing so at rates that exceeded the growth in the State's population.

Second, even if [K.S.A. §60-19a02](#) served a public purpose, the *quid* offered to injured victims of medical malpractice—the assurance that unreasonable “conservative” judges, *Samsel*, 246 Kan. at 361, 789 P.2d at 557, would no longer be permitted to use their supposedly boundless discretion to reduce a jury’s award of non-economic damages below \$250,000—was hardly equal in value to the *quo* that malpractice victims were compelled to forego: (a) the right to have a jury award above \$250,000 if the jury found that such damages were needed to compensate a malpractice victim for what could be decades of severe pain-and-suffering or other noneconomic injuries, and (b) the right to have a “liberal” judge augment an inadequate jury award through additur. 246 Kan. at 360, 789 P.2d at 557.

2. K.S.A. §60-19a02 Provides Even Less of a Commensurate Remedy Today for the Right That Was Abrogated in 1988.

The Kansas Supreme Court has stated that “all” legislative substitutes for common law rights and remedies “may need periodic modification” to ensure that the substitute initially provided by the legislature remains equal in value to the right it stripped away, i.e., that what was once a fully adequate *quid pro quo* could become an insufficient one through passage of subsequent events. *Bair v. Peck*, 248 Kan. 824, 844, 811 P.2d 1176, 1191 (1991). Even if *Samsel* was correct in concluding, in 1990, that [K.S.A. §60-19a02](#) provided a constitutionally unobjectionable substitute remedy when it *29 was enacted twenty-two years ago, nearly two decades of inflation have eroded the value of the \$250,000 in non-economic damages that [K.S.A. §60-19a02](#) set as a floor for a court’s award (provided, of course, that a jury had already determined that that sum—or perhaps much more—was really what justice required in a particular case).

Thus, according to the federal “Consumer Price Index Inflation Calculator,” “\$250,000 in 1988 has the same buying power as \$142,222.37 in 2007,” U.S. Dept. of Labor, Bureau of Labor Statistics, “Consumer Price Index Inflation Calculator.” <http://www.bls.gov/cpi/> (last visited July 3, 2007), that is, less than 57% what \$250,000 could buy when [K.S.A. §60-19a02](#) became law in 1988. Given that life expectancies have increased over the same span, it is plain that the passage of time has not only eroded the value of a \$250,000 award but eroded *Samsel’s* rationale as well. For this reason, too, [K.S.A. §60-19a02](#) should be held void and inoperative.

C. K.S.A. §60-19a02’s Inflexible Cap on Damages Infringes upon the Inherent and Exclusive Powers of this Court and Violates the Fundamental Separation of Powers

As demonstrated below, [K.S.A. §60-19a02’s](#) inflexible cap functions as a statutory remittitur, one that effectively usurps the courts’ inherent, exclusive, and constitutionally protected powers to grant remittiturs, fundamentally abolishes the judiciary’s authority to order new trials (if the jury’s award is inadequate), and, in so doing, essentially robs judges of their discretion to act as judges, just as it deprives individuals of their right to have juries function fully as juries.

Because the judiciary’s power to grant remittiturs is a traditional, inherent, exclusive, and constitutionally protected one and because the authority to order new trials (if the jury’s award is either excessive or inadequate) is equally inherent, exclusive, and *30 protected, [K.S.A. §60-19a02](#) flouts the constitutional separation of powers. This principle is critically important because it prevents “a dangerous concentration of power . . . through the checks and balances each branch of government has against the others.” *State v. Beard*, 274 Kan. 181, 185, 49 P.3d 492, 496 (2002)(citation omitted). Indeed, by commandeering the judiciary’s sole and absolute authority to reduce excessive damage awards through remittiturs and by abrogating the judiciary’s power to allow a plaintiff to seek to overcome an inadequate damage award through the grant of a new trial, [K.S.A. §60-19a02](#) contravenes the separation of powers in the same manner identified by the Illinois Supreme Court in striking down a \$500,000 cap on non-economic damages:

The cap on damages is mandatory and operates wholly apart from the specific circumstances of a particular plaintiffs . . . injuries. Therefore, *[the cap] unduly encroaches upon the fundamentally judicial prerogative of determining - whether a jury’s assessment of damages is excessive within the meaning of the law* ____
[T]he cap... forces the successful plaintiff to forgo part of his or her jury award without the plaintiff’s

consent, in clear violation of the well-settled principle that a trial court does not have authority to reduce a damages award by entry of a remittitur if the plaintiff objects or does not consent. As such, the statutory scheme unduly expands the remittitur doctrine.

Best v. Taylor Machine Works, 689 N.E.2d 1057, 1080 (Ill. 1997)(citations omitted; emphasis added).

1. Separation of Powers Is an “Essential,” Outstanding,” and “Fundamental” Feature of Our “Constitutional Democracy.”

Both the U.S. and Kansas Constitutions “establish[] a ‘judicial department’ with the ‘province and duty... to say what the law is’ in particular cases and controversies,” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), and the framers of the Kansas Constitution must be understood, just as the framers of the U.S. Constitution, to have “crafted this charter of *31 the judicial department with an expressed understanding that it gives the... judiciary the power, not merely to rule on cases, but to *decide* them.” *Id.* See *State Auditor v. Atchison, T. & S. F. R. Co.*, 6 Kan. 500, 1870 WL 507, at *3 (1870) (“there must have been a decision ‘by a court,’ ‘clothed with judicial authority, and acting in a judicial capacity.’”) (citation omitted). See also *In re Gunn*, 50 Kan. 155, Syl.¶ 13, 32 P. 470 (1893).

Although the doctrine of separation of powers is not expressly set forth in the Kansas Constitution, “it has long been recognized that the very structure of our three-branch system gives rise to the doctrine.” *State v. Beard*, 274 Kan. 181, 185, 49 P.3d 492, 496 (2002)(citation omitted). Thus, our Constitution creates three distinct and separate departments of government: the legislative, the executive, and the judicial. Kan. Const., Arts. 1, 2, and 3. See *Wesley Medical Center v. McCain*, 226 Kan. 263, 269, 597 P.2d 1088, 1093-94 (1979)(“The legislative power is delegated to the legislature, (section 1, art. 2, Const.)) and the judicial power to the judiciary, (section 1, art. 3, Const.)) and the executive power to the executive officers of the government, (sections 1, 3, art. 1, Const.) Under this grant of power it seems to be well settled that it is the peculiar province of the legislature to make the laws, of the judiciary to construe and expound them, and of the executive to execute and enforce them. . . . These three great powers or branches of power of government... are distinct and separate from each other; . . . and that each is delegated to its appropriate department, and can be exercised by no other department.”).

Our Supreme Court has emphasized “ ‘[t]he doctrine of separation of powers is an outstanding feature of the American constitutional system.’ ” *Beard*, 274 Kan. at 185, 49 P.3d at 496 (citation omitted). Thus, nearly a century ago, the Court explained that “ ‘[i]t is highly important to separate the legislative, judicial, and executive functions, and that *32 the officer of one department should not exercise the functions conferred upon another.’ ” *Nash v. City of Glen Elder*, 81 Kan. 446, 106 P. 292, 294 (1910)(citation omitted).

It is precisely for these reasons that “[t]he doctrine of the separation of powers is a fundamental principle,” one “essential to a constitutional democracy, such as ours.” *McCain*, 226 Kan. aAt 270, 597 P.2d at 1094. Furthermore, given the “fundamental” role played by the separation of powers and the inherent powers of the judiciary in preventing “a dangerous concentration of power” and preserving our “constitutional democracy,” it is hardly surprising that the Supreme Court has admonished that trial courts “must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent.” *State v. Bennett*, 219 Kan. 285, 289, 547 P.2d 786, 791 (1976). See *State v. Kansas City*, 186 Kan. 190, 197, 350 P.2d 37, 42 (1960)(“[e]ach of the three branches of our government should be zealous of its jurisdiction and each should also be vigilant to see that it does not encroach upon the jurisdiction of the other two.”).

For the most part the Kansas legislature has rarely attempted to limit, usurp or impair the judiciary’s powers. This is so even though the Court has long recognized that “ ‘the absolute independence of the departments and the complete separation of the powers is impracticable, and was not intended.’ ” *Nash v. City of Glen Elder*, 81 Kan. 446, 106 P. 292, 294 (1910)(citation omitted). Thus, despite the legislature’s longstanding reluctance to invade the province of the judiciary and the Court’s pragmatic,

nearly deferential approach to assessing claimed usurpations of one branch by the other, the Court has not hesitated to invalidate actions-including the enactment of statutes-by which one branch has usurped or even impaired the powers of another branch.

*33 The Court has been particularly keen to preserve judicial powers and prerogatives, emphasizing: “The rule is well settled that the judicial power cannot be taken away by legislative action. Any legislation that *hampers* judicial action or *interferes* with the discharge of judicial functions is unconstitutional.” *Board of Comm'rs of Wyandotte County v. General Securities Corp.*, 157 Kan. 64, 138 P.2d 479, 487 (1943) (emphasis added; citation omitted).

As shown below, the separation of powers doctrine equally bars legislative usurpation of or interference with the judicial powers of granting remittiturs or new trials if damages are inadequate.

2. K.S.A. §60-19a02's Cap Violates the Separation of Powers

K.S.A. §60-19a02's cap on damages violates these constitutional principles by overriding the jury's verdict and by substituting a legislated whim for the considered judgment of the courts, which alone have the power and the right to order a remittitur or a new trial (on damages or all issues) if the judge determines the jury's verdict is excessive or insufficient.

As the supreme courts of Illinois and Washington have recognized, an inflexible legislatively pre-ordained reduction of a jury's fairly rendered and factually based award of damages constitutes an impermissible “attempt to mandate legal conclusions,” *Sofie*, 771 P.2d at 721, one that “infringe[s] upon the inherent powers of judges” to grant remittiturs and new trials on damages. *Best*, 689 N.E.2d at 1079. Applying these principles and precedents to the facts of this case leads to the same conclusion reached by the Illinois Supreme Court in *Best* and the Washington Supreme Court in *Sofie*: inflexible *34 caps invade the province of the judiciary, usurp inherent judicial powers, and violate separation of powers.

The Illinois Supreme Court predicated its ruling in *Best* in large part on its appreciation of the fact that remittitur of excessive jury verdicts “has been a traditional and inherent power of the judicial branch of government” for over a century. *Id.* Kansas jurisprudence is in complete accord, as our Supreme Court has recognized that the exercise of the power to grant remittiturs and new trials are decidedly judicial functions, and has held that the power goes to the heart of the courts' historic authority to hear and determine justiciable controversies. Thus, “Kansas has a long history of permitting remittitur. Although there has been no express statutory authorization for remittitur in Kansas since 1964, the rule is well established in Kansas that either a trial or appellate court may deny a new trial on plaintiff's acceptance of a remittitur.” *Dixon v. Prothro*, 251 Kan. 767, 772, 840 P.2d 491, 494 (1992) (citations omitted). See *Plant Seed Co. v. Hall*, 14 Kan. 553, 1875 WL 1393, *2 (1875). On the other hand, “when a trial court determines that a jury verdict is inadequate, the court should grant the plaintiff a new trial or a new trial limited to damages.” *Dixon*, 251 Kan. at 774, 840 P.2d at 496. See *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 278-79, 875 P.2d 949, 960 (1994).

Best also emphasized that one of the virtues of judicial, in contrast to legislative, remittiturs is that they are and necessarily must be considered on a case-by-case basis, “because the evidence and circumstances supporting verdicts must be carefully examined before a jury's assessment of damages is reduced.” *Best*, 689 N.E.2d at 1080; see also *Sofie*, 771 P.2d at 720-21 (invalidating damages cap and observing that “[a]ny legislative attempt to mandate legal conclusions... would violate the separation of powers.”

*35 Our Supreme Court has honored the same preference for case-by-case adjudication, noting that Kansas have long “preferred to decide each set of facts on a case-by-case basis.” *In re Estate of Haneberg*, 270 Kan. 365, 375, 14 P.3d 1088, 1096 (2000). This is especially true in tort cases, where liability and damages “must be determined on a case-by-case basis.” *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 467, 712 P.2d 1199, 1203 (1986). Tellingly, in determining if a legislative *quid pro quo* for a jury's award of damages is sufficient for due process purposes, the Supreme Court has held that case-by-case determinations are necessary as “no hard and fast rule can apply to all cases.” *Lemuz*, 261 Kan. at 955, 933 P.2d at 148 (citation omitted).

A court may not “substitute its judgment for that of the trier of fact in the matter of assessing damages ... unless the verdict shocks the conscience or indicates passion and prejudice on the part of any trier of fact.” *Tice v. Ebeling*, 238 Kan. 704, 709, 715 P.2d 397, 401 (1986)(citation omitted). Because remittitur authority is judicial, see *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715 (Ill. 1952) (the power “to adjudge, determine and render a judgment is beyond all question a judicial act, and can only be employed by judicial authority”); see also *State v. Mitchell*, 234 Kan. 185, 194, 672 P.2d 1, 8 (1983), and limitation on that judicial authority derives from the right to a jury trial, both the U.S. Constitution and the Kansas Constitution bar the legislature from supplying to the courts or from arrogating to itself the power to substitute their opinions for the jury's finding of fact. See *Bd. of Comm'rs of Wyandotte County v. Gen. Sec. Corp.*, 157 Kan. 64, 138 P.2d 479, 487 (1943) (It is “ ‘well settled that the judicial power cannot be taken away by legislative action,’ ” and any statute “ ‘that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional,’ ”) (citation omitted).

*36 K.S.A. §60-19a02-by exercising, through a legislative act, the inherent, traditional, and exclusive judicial power to grant a remittitur, by effectively abolishing the inherent, traditional, and sole judicial authority to order a new trial in case of an excessive or inadequate award, and by removing inherent judicial discretion from the trial of a medical malpractice case-patently conflicts with the constitutional separation of powers and usurps the “fundamental” judicial power to consider whether the jury award is supported by the evidence and to grant a remittitur or a new trial, as appropriate.

Adherence to the constitutional separation of powers prevents the Kansas legislature from trying a case and deciding an issue of liability within judicial cognizance. It may not determine the amount of damages appropriate in a common law action tried in our system of individualized justice. To do so is to transgress the bright lines that separate the judicial from the legislative branches. That is why the Washington Supreme Court held that “[a]ny legislative attempt to mandate legal conclusions would violate the separation of powers” and thus struck down a similar cap on non-economic damages. *Sofie*, 771 P.2d at 721, cited with approval in *Best*, 689 N.E.2d at 1081.

Kansas' cap is even more intrusive than the caps invalidated by the Illinois and Washington Supreme Courts, as it completely abolishes judicial discretion to award noneconomic damages in any amount above or below \$250,000. Thus, K.S.A. §60-19a02(d) provides “[i]f the verdict results in an award for noneconomic loss which exceeds the limits of this section, the court shall enter judgment for \$250,000.” The *Samsel* Court concluded that this language “while taking away a plaintiff's right to receive noneconomic losses in excess of \$250,000, also insure[s] the injured plaintiff that the court will not exercise its discretion to award less than \$250,000 when higher *37 damages are awarded by the jury.” *Samsel*, 246 Kan. at 362, 789 P.2d 558. In other words, the cap is an equal-opportunity usurper: it prohibits courts from increasing and decreasing awards, or ordering new trials on awards, regardless of the particular evidence in a case, regardless of what the jury has found, and regardless of what the court thinks is an the necessary and proper award.

In sum, the Kansas legislature did not merely “hamper” or “interfere” with judicial powers, *Bd of Com'rs of Wyandotte Cty. v. Gen'l Sec. Corp.*, 157 Kan. 64, 138 P.2d at 487, it obliterated that power. It overstepped its legitimate authority by exercising the judiciary's powers to grant remittiturs or order new trials (if the jury's award is either excessive or inadequate) and by usurping the judicial authority to assure that jury verdicts properly reflect the evidence adduced at trial. For these reasons, this Court should hold K.S.A. §60-19a02 violates the constitutionally mandated separation of powers.

D. K.S.A. §60-19a02's Inflexible Cap Violates Equal Protection

This Court should invalidate K.S.A. §60-19a02 as violative of Kansas Bill of Rights guarantee of equal protection because: (1) K.S.A. §60-19a02 arbitrarily and irrationally discriminates between similarly situated, “arguably indistinguishable” persons, e.g., those who suffer the most grievous injuries and receive only a fraction of the damages awarded by a jury and those who suffer comparatively less horrendous injuries and, as a result, receive all of the damages awarded by a jury; and (2) there is no truth to the claims of K.S.A. §60-19a02's sponsors that malpractice claims were supposedly skyrocketing in number or allegedly exploding in size, that these skyrocketing claims and exploding awards were the ostensible reason why insurance companies had

no choice but to repeatedly increase malpractice insurance premiums, that *38 physicians were reputedly fleeing the state (and were supposedly doing so because of premium increases), and that K.S.A. §60-19a02's cap was needed to cure these problems. As a result, K.S.A. §60-19a02 does not survive even deferential, rational-basis review, let alone the strict scrutiny that is required of a statute that implicates a fundamental right like the right to trial by jury or the right to a remedy by due course of law.

1. The Court Should Apply Strict Scrutiny in Assessing Whether K.S.A. §60-19a02 Violates Due Process and Equal Protection

Section 1 of the Bill of Rights of the Kansas Constitution specifies that “AH men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”

The standards for determining whether a statute satisfies guarantee of due process under Section 1 of the Bill of Rights, are well-established as follows:

[t]he concept of equal protection of the law is one which “emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.” When a statute is attacked on equal protection grounds, the general rule is that the statute is presumed constitutional, and the burden is on the party attacking the statute to prove otherwise. Only in cases involving “suspect classifications” or “fundamental interests” is the presumption of constitutionality displaced and the burden placed on the party asserting constitutionality to demonstrate a compelling state interest which justifies the classification.

Barrett ex rel Barrett v. Unified School Dist. No. 259, 272 Kan. 250, 255-56, 32 P.3d 1156, 1161-62 (2001) (emphasis added).

In assessing the constitutionality of K.S.A. §60-19a02, this Court should apply the more stringent standard and should strictly scrutinize that statutory provision because, as demonstrated above, that statute not only directly “involv[es]” the “substantial,” “valuable,” and “fundamental” rights to trial by jury and remedy by due course of law, *Gard v. Sherwood Const. Co.*, 194 Kan. 541, 549, 400 P.2d 995, 1002 (1965)(right to *39 trial by jury is “fundamental”); *Adams v. Sir. Francis Regional Medical Center*, 264 Kan. 144, 173, 955 P.2d 1169, 1187 (1998)(right to a remedy is fundamental), it eviscerates those rights. As noted above, “the burden placed on the party asserting [the statute's] constitutionality to demonstrate a compelling state interest which justifies the classification.” *Barrett v. Unified School Dist.* 272 Kan. at 256, 32 P.3d at 1162.

Additionally, and in the alternative, this Court could and should invalidate K.S.A. §60-19a02 under the less stringent, rational basis standard. Under that test, the legislature

is presumed to act within its constitutional power despite the fact the application of its laws may result in some inequity. The equal protection clause goes no further than to prohibit invidious discrimination. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it ___ Under that test, a statute is rationally related to an objective if the statute produces effects that advance, rather than retard or have no bearing on, the attainment of the objective. So long as the regulation is positively related to a conceivable legitimate purpose, it passes scrutiny; it is for the legislature, not the courts, to balance the advantages and disadvantages.

State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 265 Kan. 779, 792, 962 P.2d 543, 555-56 (1998)(internal quotation marks and citations omitted). Significantly, however, the Supreme Court has stressed that “this standard of review, although deferential, is not a toothless one. The rational-basis test [still] contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals.” *Unified School Dist. No. 229 v. State*, 256 Kan. 232, 260, 885 P.2d 1170, 1188 (1994)(internal quotation marks and citations omitted).

2. K.S.A. §60-19a02 Violates the Guarantee of Equal Protection

As shown below, defendant cannot meet his burden and satisfy these high standards. Indeed, K.S.A. §60-19a02 cannot survive even minimal rationality review, as *40 its sponsors and supporters never adduced any credible evidence to buttress their claims and as the only evidence in this case completely undermines those claims.

K.S.A. §60-19a02's proponents claimed it was needed to cure a medical malpractice insurance crisis in Kansas, a crisis that was supposedly caused by medical malpractice claims that were “skyrocketing” in number and awards that were “exploding” in size. This malpractice litigation crisis supposedly caused insurers to charge ever-higher premiums, which, in turn, purportedly forced physicians to flee the State, to abandon rural areas of the State, or desert certain specialty practice areas, such as obstetrics.

The unrebutted evidence establishes that: medical malpractice claims and lawsuits were not skyrocketing in number; malpractice awards were not exploding in size; the periodic spikes in medical malpractice premiums were due to the insurance business cycle and insurer investment decisions (not malpractice claims and awards); doctors were flocking into Kansas, not fleeing from the state, both in absolute numbers and in proportion to Kansas' population, and were doing so at an accelerating rate; and that K.S.A. §60-19a02 was neither necessary nor likely to produce lower medical malpractice insurance premiums. Finally, this evidence shows that K.S.A. §60-19a02's cap on non-economic damages has had a disparate impact on women and the **elderly**, primarily because they typically earned no or lower wages. Cumulatively, this evidence establishes that K.S.A. §60-19a02 does not meet the rational-basis test, let alone the strict-scrutiny test that properly applies here.

First, contrary to widespread myth, there was simply no credible evidence of a medical malpractice litigation explosion in the 1980s, either in the United States in general or Kansas in particular. Medical injury due to negligence is not infrequent, the *41 incidence of claims is much lower than the incidence of injury, plaintiffs lose most jury trials and jurors tend to view plaintiff claims with skepticism, jury verdicts tend to be consistent with judgments of neutral medical experts, judges agree with jury verdicts, no evidence supports claims of a “deep pockets” effect, little evidence supports the claim that juries are “overwhelmed” by plaintiffs' experts, damage awards tend to correlate with severity of injury, outlier awards tend not to withstand post-verdict adjustments, claims of frivolous litigation are not empirically substantiated, injured claimants often receive less than actual economic losses, and “pain and suffering” awards compensate for real injuries.

Second, the medical malpractice insurance “crisis” was caused by the medical malpractice insurance industry, not the tort system. Numerous studies-including a 1986 Report by the special Task Force of the National Association of Attorneys General (NAAG)-all reach the same result, with each one concluding that insurance company practices and overall economic conditions, not plaintiffs' malpractice claims or awards, were driving the pre-K.S.A. §60-19a02 increases in medical malpractice premiums or increases in such premiums at the time of the statute's enactment.

Numerous courts have reached similar conclusions. *See, e.g., In re Certification of Questions of Law from U.S. Ct. of App. for Eighth Cir.*, 544 N.W.2d 183, 190 (S.D. 1996), superseded by statute as stated in *Homestake Mining Co. v. S.D. Subsequent Injury Fund*, 644 N.W.2d 612, 618 (S.D. 2002); *Sorrell v. Thevenir*, 633 N.E.2d 504, 509-11 (Ohio 1994); *Crowe v. Wigglesworth*, 623 F. Supp. 699, 706 (D.Kan. 1985); *Kenyon v. Hammer*, 680 P.2d 961, 975-76 (Ariz. 1984); *Boucher v. Sayeed*, 459 A.2d 87, 92-93 (R.I. 1983); *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978). For example, the same *42 year K.S.A. §60-19a02 was enacted, the Wyoming Supreme Court found there was no insurance crisis tied to medical malpractice litigation and the tort “reform” statute enacted in response to the alleged crisis fatally failed to address other likely causes of the rise in insurance premiums, which included “poor management, bad underwriting and bad investments.” *Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988).

Just as medical malpractice litigation did not *cause* the insurance crisis, there was and is no evidence that tort “reforms” like caps on damages-would *cure* that crisis. Thus, there is simply no evidence that caps on non-economic loss damages have alleviated or will prevent the problem of periodic cycles in the liability insurance markets, or the sharp increases in medical malpractice premiums in Kansas and other states since 1980.

Finally, there was no “physician exodus” crisis in Kansas. Perhaps no claims were more important to the enactment of [K.S.A. §60-19a02](#)'s cap than the various assertions that the State was experiencing extreme difficulties attracting and maintaining a sufficient network of physicians to meet the needs of the residents of this state. In like fashion, the most important reason why [K.S.A. §60-19a02](#) cannot survive minimal review, let alone strict scrutiny, is equally stark: there is absolutely no truth to the claim that doctors were fleeing from or refusing to move to Kansas. In fact, during the ten years that preceded [K.S.A. §60-19a02](#)'s enactment, Kansas did not experience *any* appreciable problems-let alone extreme difficulties-in recruiting and retaining a network of physicians sufficient to meet the needs of the State's residents.

Thus, contrary to the claims of [K.S.A. §60-19a02](#)'s sponsors, the American Medical Association reports that the number physicians in Kansas not only grew in *absolute* numbers during the relevant period-from 3, 092 in 1975, to 3, 893 in 1980, to *43 4, 546 in 1985, to 5, 037 in 1990-but, more important, the growth of the number of physicians in Kansas greatly outstripped the growth in the State's population during the relevant period, with the “Physician/Population Ratio” rising from 137 in 1975, to 166 in 1980, to 187 in 1985, to 203 in 1990. AMA, *Physician Characteristics And Distribution In The United States* (2007), Table 5.17, at pp. 327-28. This data demonstrates that doctors were increasingly *flocking to Kansas*, rather than steadily *fleeing from the State*, in the thirteen years before [K.S.A. §60-19a02](#) was enacted.

This data comports with the research recently summarized by the Wisconsin Supreme Court regarding the so-called “physician exodus crisis,” which noted that tort “reform” proponents “sometimes” exaggerate the “crises” they claim necessitates changes in the law. “The General Accounting Office [GAO] found that despite extensive media coverage of physician departures from states, *the numbers of physician departures* reported were sometimes inaccurate and *were actually relatively low.*” [Ferdon v. Wise. Patients Com. Fund](#), 701 N.W.2d 440, 485-86 & nn. 224-26 (Wisc. 2005)(emphasis added; citing U.S. GAO, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, at 5, 10, 13, GAO-03-836 (Aug. 29, 2003), <http://www.gao.gov/new.items/d03836.pdf>).

Furthermore, just as research shows that doctors were not fleeing Kansas, or other states, because of rising insurance rates (often because physicians' incomes were rising even faster than- insurance premiums), research also establishes that caps do not lure doctors to states that have enacted them. Thus, “[s]tudies indicate that caps on non-economic damages do not affect doctors' migration. The non-partisan U.S. [GAO] concluded that doctors do not appear to leave or enter states to practice based on caps on *44 non-economic damages in medical malpractice actions.” *Id* Numerous independent scholars concur. *See, e.g.*, Hyman, [Believing Six Improbable Things: Medical Malpractice and “Legal Fear,”](#) 28 *Harv. J.L. & PUB. POL'Y* 107, 114-15 (2004); Baicker, [The Effect of Malpractice Liability on the Delivery of Health Care](#), Nat'l Bur. Of Econ. Research, Working Paper Series, No. 10709 (Aug. 2004) Significantly, the Wisconsin Supreme Court relied on this data in concluding that there was no rational basis whatsoever for that state's cap on damages in medical malpractice cases, a conclusion that led that court to hold that that cap violated the state constitution's guarantee of due process. [Ferdon](#), 701 N.W.2d at 491.

[K.S.A. §60-19a02](#) imposes special *burdens* on distinct sub-classes of tort victims, such as the most grievously injured victims of medical malpractice. The cap comes into play only after the factfinder determines that a plaintiff's non-economic damages exceed \$250,000. It is well-established that the damages awarded in personal injury cases correlate closely to the injuries themselves, *i.e.*, more severe injuries lead to higher awards of damages. *See generally* Galanter, [Real World Torts: An Antidote to Anecdote](#), 55 *MD.L.REV.* 1093, 1120-1123 (1996)(proving positive correlation between the severity of tort injuries and the size of damage awards). Thus, among the broad universe of all medical malpractice victims, the cap imposes special burdens only on those in greatest need of relief through the civil justice system.

Five years ago, in [State v. Limon](#), 280 Kan. 275, 122 P.3d 22 (2005), the Supreme Court found no “rational basis” for a statute that arbitrarily divided “arguably indistinguishable” sex offenders into two classes-punishing sodomy between adults and children of the opposite sex less severely than sodomy between adults and children of the *45 same sex-which led to the conclusion that the statutory scheme violated the equal protection of the laws guaranteed by [Section 1](#) of the Kansas Bill of Rights. *Id.*, 280 Kan. at 277, 122 P.3d at 24.

[K.S.A. §60-19a02](#)'s inflexible cap violates equal protection in a similar fashion, as it arbitrarily divides medical malpractice victims into various sub-classes: *e.g.*, those who are so severely injured that their non-economic damages are greater than \$250,000 and those whose damages are worth less than \$250,000. Members of the first, severely injured sub-class receive only a fraction of the compensatory damages awarded by the trier of fact (a fraction that perversely diminishes in inverse proportion to the severity of their injuries and the size of the damages they are awarded), while members of the second, less severely injured, sub-class receive the full measure of the damages they were awarded by the trier of fact.

In striking down a similar statute, the Ohio Supreme Court observed, “ ‘it is irrational and arbitrary to impose the cost of an intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice.’ ” See *OATL v. Steward*, 715 N.E.2d at 1092 (citation omitted). Indeed, no more arbitrary and capricious division between medical malpractice victims can be imagined.

3. [K.S.A. §60-19a02](#) cap unfairly burdens women and **elderly** malpractice victims

[K.S.A. §60-19a02](#)'s damage cap not only imposes special burdens on the most grievously injured Kansans but also on two of the poorest and least powerful groups in our society: women and the **elderly**. Professor Finley's published empirical research demonstrates that a cap on non-economic damages invariably has a discriminatory disparate impact on female and **elderly** malpractice victims. [K.S.A. §60-19a02](#) deprives *46 female and **elderly** Kansans of equal protection of the law because there is no conceivably rational basis for such disparate treatment.

The reason why a cap on non-economic damages has a discriminatory adverse impact on women is that juries award women malpractice victims a greater proportion of their overall compensatory damages in the form of non-economic damages than male victims of malpractice. A cap on non-economic loss also exacerbates existing gender-based disparities in the tort system. Professor Finley's research demonstrates that men's overall jury awards tend to be higher than women's total awards, due in part to men's higher, wage-based economic damages; because the cap operates to deprive women of a greater proportion of their jury awards, the cap increases the disparity between the average amount that men recover for their medical injuries compared to the average amount that women recover.

This gender-based discriminatory impact of [K.S.A. §60-19a02](#) is especially pronounced in cases involving female-specific injuries, such as gynecological malpractice which results in loss of fertility or other reproductive harm, impaired sexual functioning, disfigurement, physical impairment, or damage to areas of the body associated with physical intimacy and pleasure. Research also demonstrates that in these types of cases, juries award over 75% of overall compensatory damages in the form of non-economic damages.

Similarly, compared to nonelderly plaintiffs, **elderly** plaintiffs receive a much greater proportion of their overall damage awards as non-economic damages. This is due to the fact that **elderly** plaintiffs, whose working days are almost always entirely behind them, do not incur the same extent of past or future wage loss as nonelderly plaintiffs. *47 Moreover, given their shorter remaining life expectancy, **elderly** plaintiffs will not incur as many years of projected future medical expenses. But despite these reduced areas of economic loss, **elderly** victims of malpractice may suffer immensely and may still experience debilitating pain and reduced life activities. Non-economic damages become the principal way for the jury to assess the severity and life-altering effects of the injury.

Because [K.S.A. §60-19802](#)'s inflexible cap irrationally imposes special burdens on these and other medical malpractice victims, [K.S.A. §60-19a02](#) should be struck down as violative of equal protection.

III. Defendant Margolis Is Precluded From Raising The Noneconomic Damage Cap [K.S.A. §60-19a02] Due To His Failure To Affirmatively Plead The Same In His Answer And His Failure To Raise It In The Pretrial Order.

Appellant respectfully submits that the district court erred in considering [K.S.A. §60-19a02](#) due to Dr. Margolis' failure to identify the same as a defense in the *Answer Of P. David Margolis, M.D.* or in the *Pretrial Conference Order*. Kansas law provides that “[i]n pleading to a preceding pleading a party shall set forth affirmatively ... any other matter constituting an avoidance or affirmative defense.” [K.S.A. 60-208\(c\)](#). Kansas law further provides that “[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required” [K.S.A. 60-212\(b\)](#). As such, under both of these statutes, defendant was required to assert [K.S.A. 60-19a02](#) as a defense in his answer and his failure to do so constitutes a waiver of [K.S.A. 60-19a02](#) in this matter.

Likewise, the district court should not have applied [K.S.A. §60-19a02](#) due to Dr. Margolis' failure to raise [K.S.A. §60-19a02](#) in the pretrial order. Kansas [Supreme Court Rule 140](#) provides the procedure for the final pretrial conference and provides that *48 “[d]efendant will state concisely his factual contentions and the theories of his defense and claims for relief.” [Kan.Ct.Rule.Annot. 140\(g\)\(2\)](#). The Rule further provides that the “questions of law shall be stated.” [Kan.Ct.Rule.Annot. 140\(g\)\(12\)](#). The language of these Rules is mandatory and requires the defendant to identify [K.S.A. 60-19a02](#) in the pretrial order regardless of whether [K.S.A. 60-19a02](#) is a defense or question of law.

Kansas law is clear that an issue or claim for relief that is not identified in the pretrial order should not be entertained by the trial court. See [Nelson v. Nelson](#), 38 Kan.App.2d 64, 75, 162 P.2d 43 (2007); [Riverside Drainage District Of Sedgwick County v. Hunt](#), 33 Kan.App.2d 225, 228, 99 P.3d 1135 (2004); and [Herbstreith v. Bakker](#), 249 Kan. 67, 75, 815 P.2d 102 (1991).

In [McCain Foods, Inc. v. Central Processors, Inc.](#) 275 Kan. 1, 61 P.3d 68 (2002), Shore asserted a “K.S.A. 33-208(a) defense that transfers to persons who took in good faith and for a reasonably equivalent value are not voidable.” *Id.* at 18. McCain asserted that “Shore did not preserve the defense he now asserts on appeal because the agreed-to pretrial order only preserved Shore's knowledge about insolvency as an issue of fact.” *Id.* The Court agreed and held:

The purpose of the pretrial conference ... is to eliminate the element of surprise from trials and to simplify the issues and procedure by full disclosure to all parties of the anticipated evidence, and factual and legal issues, and to consider ‘[s]uch other matters as may aid in the disposition of the action.’ [[K.S.A.2001 Supp. 60-216\(c\)\(7\)](#)].” [Burkhart v. Phibco Products Co.](#), 241 Kan. 562, 570, 738 P.2d 433 (1987). The pretrial order under [K.S.A.2001 Supp. 60-216\(e\)](#) controls the course of the action unless modified to prevent manifest injustice. See [Herbstreith v. de Bakker](#), 249 Kan. 67, 75-76, 815 P.2d 102 (1991). *An issue or claim for relief that is not contained in the pretrial order should not be entertained by the trial court.* See [Kleibrink v. Missouri-Kansas-Texas Railroad Co.](#), 224 Kan. 437, 442, 581 P.2d 372 (1978). [Emphasis added].

*49 *Id.* at 18-19. Thus, a defendant waives an issue or claim for relief by failing to include the same in the pretrial order.

Kansas Appellate Courts have recognized on a number of occasions that the defendant waived a defense or claim for relief by failing to include it in the pretrial order. See [Riverside Drainage District Of Sedgwick County v. Hunt](#), 33 Kan.App.2d 225, 228-229, 99 P.3d 1135 (2004)(“Preliminarily, we note that the drainage district now claims that the easement was actually owned by the City We will not consider this. This was not an issue identified in the pretrial order.”); [Dunn v. Unified School District 367](#), 30 Kan.App.2d 215, 40 P.3d 315 (2002)(“The first time defendant asserted that Dunn failed to comply with [K.S.A. 12-105b](#) was in its supplemental trial brief, and the issue was not listed in the pretrial order. . . . The issue is not properly before this court.”); [O'Donnell v. Fletcher](#), 9 Kan.App.2d 491, 492, 681 P.2d 1074, 1076 (1984)(Defendant waived the statute of limitations defense by failing to plead the statute as a defense).

A number of courts in other jurisdictions have recognized that the defendant waives a statutory damage cap by failing to assert it in his answer or the pretrial order. See [Bentley v. Cleveland Board of County Commissioners](#), 41 F.3d 600, 604 (10th Cir. 1994)(Counsel for county waive any limit on its liability afforded by the Act by failing to raise issue in its answer or pretrial

order); *Simon v. U.S.*, 891 F.2d 1154, 1155 (5th Cir. 1990) (Government's failure to plead the Louisiana statutory limits on medical malpractice damages constituted a waiver of the defense); *Ingraham v. U.S.*, 808 F.2d 1075, 1078 (5th Cir. 1987) (Government's failure to raise Texas statutory limitations on medical malpractice damages constituted a waiver of that defense in action for negligence of government physicians); *Tsai v. Wells*, 725 S.W. 2d 271, 275 (Tex. 1987)(Failure to *50 plead Texas statutory limits on medical malpractice damages constituted a waiver of the limitation on damages); and *Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975)(A state statutory limit on tort damages was an affirmative defense which was waived because not timely pleaded).

Finally, in an analogous situation the Kansas Court of Appeals determined that the statutory cap had no application where it was not raised by the parties. In *Flenory v. Eagles Nest Apartment*, 28 Kan.App.2d 906, 22 P.3d 613 (2001), the plaintiff's son died in a swimming pool at an apartment complex owned by Eagles Nest. *Id* The parties submitted the claim to binding arbitration with an agreement of a minimum award of \$50,000 and a maximum award of \$300,000. *Id* The arbitrator entered an award of \$100,000 or \$137,500 depending upon whether the \$100,000 or \$250,000 damage cap applied. *Id* at 906-07. An action was then filed in the district court to interpret whether a damage cap applied to the award. *Id* at 907. The Court found that no damage cap applied and concluded that "if the parties to arbitration want a statutory damage cap to apply to any award, they need to include a provision to that effect in their written agreement." *Id* at 908. Although the current matter is not an arbitration, the pretrial conference order entered in this action is analogous to the arbitration agreement and defendant was required to raise K.S.A. §60-19a02 as a defense or claim for relief if it wanted the same to apply to this action.

CONCLUSION

For the reasons discussed above, Appellant respectfully requests that this Court reverse the district court and enter judgment for Appellant for the full amount of the jury's verdict plus all appropriate interest on the judgment.

***51** *Oral Arguments Requested*